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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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MAX L. ISRAEL, No. C 09-0650 PJH (PR)

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Petitioner,

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vs.

10 MICHAEL EVANS, Warden,

11 Respondent.

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13 This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. §
14 2254. The court dismissed the original petition but granted leave to file an amended
15 petition. Petitioner filed a second amended petition, but the court stayed proceedings to
16 allow him to exhaust additional issues in state court, and administratively closed the case.
17 After exhausting his claims in state court, petitioner filed the instant third amended habeas
18 petition. The court summarily dismissed two of the claims, but ordered respondent to show
19 cause why the writ should not be granted as to the remaining four claims. Respondent filed
20 an answer and a memorandum of points and authorities in support of it, and lodged exhibits
21 with the court. Petitioner responded with a traverse. For the reasons set out below, the
22 petition is denied.

23

BACKGROUND

24

On October 14, 2004, a consolidated information was filed in the Santa Clara
Superior Court, charging petitioner with, in count one, carjacking with the personal use of a
firearm, see Cal. Penal Code §§ 215, 12022.5(a); in count two, vehicle theft with a prior
conviction, see Cal. Vehicle Code §§ 10851(a), 666.5; and, in count three, reckless driving
while evading an officer, see Cal. Vehicle Code §§ 2800.1, 2800.2(a). The information

1 further alleged that petitioner had three prior convictions under California's three strikes
2 law, see Cal. Penal Code §§ 667(b)-(l), 1170.12, two "Proposition 8" priors, see Cal. Penal
3 Code § 667(a), four prison priors, see Cal. Penal Code § 667.5(b), and one prior conviction
4 for vehicle theft. See Cal. Vehicle Code § 10851(a). On March 23, 2005, petitioner waived
5 his right to a jury trial on the prior conviction allegations and, on the same date, the court
6 granted the prosecution's motion to consolidate the cases.

7 On April 6, 2005, a jury found petitioner guilty on all counts as charged, with the
8 exception of the enhancement on count one where the jury found that he was armed with,
9 but did not personally use, a firearm. In a bifurcated proceeding held on April 11, 2005, the
10 court found the prior conviction allegations to be true. On August 25, 2005, judgment was
11 entered and petitioner was sentenced to twenty-five years to life on counts one to three,
12 consecutive to each other, and five years consecutive for the two Proposition 8 priors, for a
13 total term of eighty-five years in prison. *People v. Israel*, 2006 WL 2925665 (Cal. App. 6
14 Dist.). On October 13, 2006, the judgment of conviction was affirmed on appeal, and on
15 January 3, 2007, the California Supreme Court denied a petition for review.

16 Petitioner filed a habeas corpus petition that was denied by the state superior court.
17 Subsequent habeas petitions were summarily denied by the California Court of Appeal and
18 the California Supreme Court. After his second amended federal petition was stayed to
19 allow him to exhaust additional claims, petitioner filed another habeas petition that was also
20 denied by the superior court. Subsequent habeas petitions were summarily denied by the
21 California Court of Appeal and the California Supreme Court.

22 The California Court of Appeal summarized the facts of the offenses as follows.

23 ***I. Vehicle Theft and Evading an Officer/Reckless Driving Counts***

24 On January 8, 2004, defendant rented a white 1999 Chevy pickup
25 truck from Discount Rent-a-Car in Santa Clara. The rate was \$30 per day
26 with a minimum one-week rental. Defendant gave company owner Paul
27 Arasnia his credit card and showed Arasnia his driver's license. Arasnia
took an impression of the credit card and wrote up a charge for a \$300
deposit. The amount of the deposit was based on the rental car
company's insurance deductible and was intended to cover any damage
to the vehicle.

28 Arasnia did not charge defendant's credit card at the time of the

1 rental. He planned to hold the charge slip until the truck was returned.
2 Upon returning the vehicle, defendant had the option of paying for the
3 rental with a credit card, by check, or with cash.

4 At the time of the rental, Arasnua did not do anything to confirm
5 that the credit card was valid. Arasnua did not indicate a return date on the
6 rental agreement because the rental term might be extended. A customer
7 could extend the rental period by calling the company.

8 At about 4:00 a.m. on January 15, 2004, Ricky Ziesmer was
9 driving around Los Altos, looking for a woman named "Janet." Ziesmer
10 had met Janet once before and hoped to "hook up" with her romantically.
11 He was having trouble finding Janet's house and called one of Janet's
12 friends. A man answered the phone, said he thought he could help
13 Ziesmer and agreed to meet Ziesmer at a gas station in Los Altos.

14 A man in a white pickup truck met Ziesmer at the gas station, told
15 Ziesmer he thought he knew where Janet lived, and agreed to show
16 Ziesmer the way. Ziesmer had never met the man before. Ziesmer
17 followed the white pickup for about an hour.

18 As they drove around, Ziesmer noticed a police car behind him.
19 The driver of the pickup truck ran a stop sign. The police officer turned on
20 his lights and passed Ziesmer in pursuit of the pickup. Ziesmer decided to
21 go home because he was under the influence of methamphetamine and
22 did not want to call attention to himself.

23 Los Altos Police Officer Bunch noticed the white pickup that
24 defendant had rented from Discount Rent-A-Car run a stop sign and
25 decided to stop the pickup. The truck did not stop after the officer
26 activated his lights, so the officer used short siren bursts to get the driver's
27 attention. The pickup truck did not stop and led the officer on a high
28 speed chase to the northern city limit of Los Altos. Officers from two other
jurisdictions took up the chase and followed defendant up Foothill
Expressway, onto Page Mill Road and Highway 280. The pickup was
going 70 miles per hour in a 50-miles per hour zone; it later reached
speeds of 80, 85, and 95 miles per hour. When the officers terminated the
pursuit, the pickup was northbound on Highway 280, north of Woodside
Road.

Later that morning, Ziesmer got a phone call from the driver of the
pickup. He said he had "dumped" the pickup because it was stolen and
asked Ziesmer to give him a ride home from San Francisco. Ziesmer, who
was on probation, figured he did not need any trouble and told the pickup
driver he could not help him.

The one-week rental period on the pickup truck ended on January
15, 2004. Defendant did not call to extend the rental. The truck was
impounded in San Francisco on January 16, 2004. A day or two later,
Arasnua received a call from the Los Altos Police advising him that the
rental truck had been involved in an incident in Los Altos. Arasnua tried to
reach defendant by phone; there was no answer. His certified letter to
defendant was returned unopened. When Arasnua tried to charge the
rental to defendant's credit card, he was told the card was not valid.
Defendant never paid Arasnua for the truck rental.

Prior to trial, Ziesmer told a police officer the driver of the pickup
truck was named "Max." He told an investigator for the District Attorney's
office, who showed him a photograph of defendant, that defendant was
the one driving the pickup and said he knew defendant by his nickname,
"Israel." At trial, Ziesmer testified that defendant was heavier and much
taller than the man who was driving the truck.

In February 2004, a firefighter found a backpack on the side of the

1 road in a residential area north of Woodside Road. The contents of the
2 backpack included defendant's driver's license, defendant's credit card,
3 and several blank checks from a Mountain View motel, three checks from
the motel that were made out to defendant, and one check from the motel
made out to "Earl P. Pike."

4 ***II. Carjacking Incident***

5 Thanh Ngo owns a body shop. He purchased a 2001 Lexus SUV
6 at auction, repaired it, and offered it for sale. On January 20, 2004,
7 defendant responded to Ngo's newspaper advertisement regarding the
Lexus. Ngo relied on his sister, Kim Ngo, who spoke better English than
he did, to negotiate with defendant and complete the paperwork for the
sale of the car.

8 Defendant test-drove the car twice. After defendant filled out
9 some of the forms, he asked to test drive the car again. Defendant made
10 a phone call and then asked if he could borrow the car to pick up his
11 girlfriend or his wife to bring the deposit money for the car. The Ngos did
12 not agree to lend him the car. When Thanh Ngo suggested defendant
13 walk, defendant said it was too far, jumped into the car and started to drive
off. Thanh Ngo jumped into the back seat of the car. Defendant drove to
14 a house on Seventh Street in San Jose and suggested Ngo get out of the
car to get the money. Ngo had a feeling defendant was going to steal the
15 car and refused to get out of the car. Defendant drove Ngo to two
schools. At the second school, defendant told Ngo he wanted to kill him.
Defendant moved his hand toward his back and Ngo saw a gun in
16 defendant's waistband. Defendant swung his arm at Ngo. Ngo jumped
17 out of the car, ran home, and asked his sister to call the police. Defendant
18 did not return the Lexus.

19 Five days later, on January 25, 2004, sheriff deputies spotted the
20 Lexus in front of a house in the Santa Cruz Mountains. They found
21 defendant inside the house, hiding under a bed. Two other people were in
22 the house. The officers found a driver's license with defendant's
23 photograph and the name "Earl Pike" on it. They also found the key to the
24 Lexus, a large amount of marijuana, a handgun, a scale, baggies,
25 methamphetamine pipes, and \$4,500 in cash.

26 *Israel*, 2006 WL 2925665 at *1-3.

27 **STANDARD OF REVIEW**

28 A district court may not grant a petition challenging a state conviction or sentence on
the basis of a claim that was reviewed on the merits in state court unless the state court's
adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law, as determined by the
Supreme Court of the United States; or (2) resulted in a decision that was based on an
unreasonable determination of the facts in light of the evidence presented in the State court

1 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
2 mixed questions of law and fact, see *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09
3 (2000), while the second prong applies to decisions based on factual determinations, See
4 *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

5 A state court decision is "contrary to" Supreme Court authority, that is, falls under the
6 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that
7 reached by [the Supreme] Court on a question of law or if the state court decides a case
8 differently than [the Supreme] Court has on a set of materially indistinguishable facts."
9 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application
10 of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly
11 identifies the governing legal principle from the Supreme Court's decisions but
12 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The
13 federal court on habeas review may not issue the writ "simply because that court concludes
14 in its independent judgment that the relevant state-court decision applied clearly
15 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must
16 be "objectively unreasonable" to support granting the writ. *Id.* at 409.

17 Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual
18 determination will not be overturned on factual grounds unless objectively unreasonable in
19 light of the evidence presented in the state-court proceeding." See *Miller-El*, 537 U.S. at
20 340; see also *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

21 When there is no reasoned opinion from the highest state court to consider the
22 petitioner's claims, the court looks to the last reasoned opinion. See *Ylst v. Nunnemaker*,
23 501 U.S. 797, 801-06 (1991); *Shackelford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir.
24 2000).

25 DISCUSSION

26 As grounds for federal habeas relief, petitioner asserts that: (1) he was convicted
27 and sentenced on a charge that was not presented at the preliminary hearing, and as to
28 which no magistrate or grand jury had found probable cause to proceed; (2) trial counsel

1 was ineffective; (3) he was denied his right to a jury trial on the allegation of prior
2 convictions in case number CC440664; (4) his sentence was imposed in excess of the
3 court's jurisdiction; (5) he was denied his right to a jury trial on the allegation of prior
4 convictions in case number CC461637; and (6) his Fourth Amendment rights were violated
5 by a warrantless search of the home where he was hiding. The court dismissed claim (1)
6 because the petition failed to state facts that pointed to a "real possibility of constitutional
7 error," see Rule 4, Advisory Committee Notes, 1976 Adoption; *O'Bremski v. Maass*, 915
8 F.2d 418, 420 (9th Cir. 1990) quoting *Blackledge v. Allison*, 431 U.S. 63 (1977), and claim
9 (6) because violations of the Fourth Amendment cannot be grounds for relief in a habeas
10 proceeding. See *Stone v. Powell*, 428 U.S. 465, 481-82, 494 (1976) (no federal habeas
11 review of Fourth Amendment claims unless state did not provide opportunity for full and fair
12 litigation of those claims). Petitioner's remaining claims will be addressed on the merits.

13 **I. Ineffective Assistance of Trial Counsel**

14 Petitioner contends that trial counsel was ineffective for failing to object to the
15 prosecutor's attempt to secure a conviction on count two, vehicle theft, because that charge
16 was never presented at a preliminary hearing for a magistrate to determine whether there
17 was probable cause to proceed. Petitioner argues that, had counsel lodged a timely
18 objection, the court may have dropped the charge, severed the counts, or postponed the
19 proceedings for further review. Respondent correctly points out that petitioner failed to
20 present this particular ineffective assistance claim to the state courts. Notwithstanding
21 petitioner's failure to exhaust the remedies available in state court, the court will address
22 the issue because it must be denied on its merits. See 28 U.S.C. § 2254(b)(2); *Granberry*
23 v. *Greer*, 481 U.S. 129, 131 (1987). Where the state court did not reach the merits of a
24 claim, the district court reviews the claim de novo. See *Cone v. Bell*, 556 U.S. 449, 472
25 (2009).

26 In order to succeed on an ineffective assistance of counsel claim, the petitioner must
27 satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687
28 (1984), which requires him to show deficient performance and prejudice. Deficient

1 performance requires a showing that trial counsel's representation fell below an objective
2 standard of reasonableness as measured by prevailing professional norms. See *Wiggins*
3 *v. Smith*, 539 U.S. 510, 521 (2003). To establish prejudice, petitioner must show a
4 reasonable probability that "but for counsel's unprofessional errors, the result of the
5 proceeding would have been different." See *Strickland*, 466 U.S. at 694. If a petitioner
6 cannot establish that defense counsel's performance was deficient, it is unnecessary for a
7 federal court considering a habeas ineffective assistance claim to address the prejudice
8 prong of the *Strickland* test. See *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998).

9 Petitioner's ineffective assistance of counsel claim lacks merit. The court notes that
10 the Federal Constitution does not guarantee the right to an adversarial determination of
11 probable cause, nor does it secure to a state court defendant a right to a preliminary
12 hearing. See *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975); see also *Ramirez v. State of*
13 *Arizona*, 437 F.2d 119, 119 (9th Cir. 1971) (*abrogated on other grounds by Ross v.*
14 *Oklahoma*, 487 U.S. 81 (1988)). Because there is no constitutional right to a preliminary
15 hearing, counsel had no basis for objecting to the vehicle theft charge not being presented
16 for a probable cause determination.

17 Petitioner also contends that counsel was ineffective for not objecting to the
18 prosecution's attempt to convict him of vehicle theft, because it is an error under California
19 law to be convicted of an offense that was not shown by evidence presented at the
20 preliminary hearing. Assuming *arguendo* that petitioner has a right to a probable cause
21 determination under California law, he fails to show a reasonable likelihood that the
22 outcome of the proceeding would have been different had counsel objected to the addition
23 of the vehicle theft charge. Although petitioner was not bound over for trial on the specific
24 charge of vehicle theft, evidence supporting the charge was presented at the preliminary
25 hearing. Specifically, Detective Tanquary from the auto theft unit of the Santa Clara Police
26 Department testified that Mr. Arasnua, the owner of the rental car lot, reported a truck stolen
27 after it was not returned upon expiration of the rental period, and he was unable to charge
28 the credit card. Mr. Arasnua identified petitioner from a photo lineup as the individual who

1 had rented the truck. Based on this testimony, the prosecution's consolidated information
2 added the vehicle theft charge. Notwithstanding the fact that the vehicle theft charge was
3 not presented at the preliminary hearing, the trial court's ruling granting the prosecution's
4 motion to consolidate the cases was appropriate given that the offenses were sufficiently
5 connected in their commission and similar in class. See Cal. Penal Code § 954.

6 Accordingly, petitioner fails to show either deficient performance or prejudice. See
7 *Strickland*, 466 U.S. at 687.

8 **II. Prior Conviction Allegations**

9 In his third and fifth claims petitioner contends that, in each of his two consolidated
10 cases, he was denied his right to a jury trial on the prior conviction allegations. He argues
11 that his waiver of a jury trial was not knowing and intelligent because he was not aware of
12 the prosecutor's motion to consolidate the cases.

13 Petitioner was placed on notice that a consolidated information, which included the
14 charges that had been bound over plus the vehicle theft charge, was filed on October 14,
15 2004, shortly after separate preliminary hearings were held in both cases. Case number
16 CC440664 charged petitioner with a single count of carjacking. Case number CC461637
17 charged petitioner with, in count one, vehicle theft, and in count two, reckless driving. On
18 November 18, 2004, petitioner's attorney filed a motion in opposition to the prosecution's
19 motion to consolidate, arguing that it was improper to join the two cases. On November 30,
20 2004, the prosecution filed an opposition to petitioner's motion.

21 Jury trial began on March 23, 2005. During pretrial proceedings the court addressed
22 petitioner to inform him of the prior conviction allegations, and verified whether he
23 understood that his attorney had informed the court that, as a matter of strategy, he would
24 waive his right to a jury trial on those issues and have a court trial on the prior conviction
25 allegations. Respondent's Exhibit ("Resp. Exh.") B, p. 6. Petitioner stated that he
26 understood. Resp. Exh. B, p. 6. After allowing petitioner a brief moment to confer with his
27 attorney, the court went on to advise him that the prosecution still had the burden of proving
28 the allegations beyond a reasonable doubt, and that in both cases he had a right to a jury

1 trial on the prior conviction allegations. Resp. Exh. B, pp. 6-7. Petitioner again stated that
2 he understood. Resp. Exh. B, p. 7. The court confirmed that petitioner understood that he
3 was foregoing his right to a jury trial solely on the prior conviction allegations. Resp. Exh.
4 B, p. 7. Petitioner again stated that he understood. Resp. Exh. B, p. 7. After verifying that
5 the prosecution also waived its right to a jury trial on those issues, the court accepted
6 petitioner's waiver of his right to a jury trial on the prior conviction allegations in both cases.
7 Resp. Exh. B, p. 7.

8 The court then heard argument from the parties regarding the prosecution's motion
9 to consolidate the two cases. Resp. Exh. B, pp. 7-19. After examining the parties
10 concerning the evidence that would be raised at trial, the court concluded that there was
11 enough similarity in the subject matter to allow the cases to be consolidated into one
12 information. Resp. Exh. B, pp. 19-21. The court also made it clear that the consolidation
13 was no surprise to the defendant, as he was aware of the charges pending against him.
14 Resp. Exh. B, p. 20.

15 A waiver of a constitutional right must be voluntary, knowing and intelligent to be
16 valid. See *Brady v. United States*, 397 U.S. 742, 748 (1970); see also *Boykin v. Alabama*,
17 395 U.S. 238 (1969). The right to a jury trial, conferred by the Constitution, is waivable, as
18 long as the waiver includes the consent of the government counsel, the sanction of the
19 court, and the "express and intelligent consent of the defendant." See *Crosby v. Schwartz*,
20 678 F.3d 784, 788 (2012) *citing* *Patton v. United States*, 281 U.S. 276, 312 (1930),
21 *overruled on other grounds by Williams v. Florida*, 399 U.S. 78, 92 (1970)

22 In his state habeas petition, petitioner first argued that his waiver was not intelligent
23 because of the trial court's failure to inform him of the privilege against self-incrimination,
24 the right to a jury trial, and the right to confront witnesses against him. In support of this
25 proposition, petitioner cited cases describing the requirements for a valid waiver of a jury
26 trial when a guilty plea is entered. The superior court concluded that the waiver in this case
27 was sufficient because petitioner was not pleading guilty and he was informed of his right to
28 a jury trial. Petitioner also argued that the waiver was not proper because it occurred

1 before the court granted the motion to consolidate the two cases filed against him. The
2 superior court denied relief because petitioner failed to explain how consolidation impacted
3 his decision to try the issues before a jury rather than a judge, and because there was no
4 authority to support the proposition that consolidation acts to undermine a waiver.

5 Petitioner now reiterates the argument that his waiver was not knowing and
6 intelligent because it occurred before the court's ruling on the prosecution's motion to
7 consolidate. In addition to the timing of the waiver, petitioner asserts that he should have
8 been informed of the nature of the jury trial rights he was waiving, including: his right to a
9 jury comprised of twelve members of the community, his right to participate in voir dire, and
10 the requirement of a unanimous verdict. He argues that the court should have explained
11 that these rights would be relinquished and the court alone would decide guilt or innocence.

12
13 Both of these argument lacks merit. The record reflects that petitioner explicitly
14 waived his right to a jury trial on the prior conviction allegations in both cases after being
15 placed on notice months earlier that the prosecution had filed a consolidated information.
16 Petitioner was aware of the charges pending against him, and the decision to waive a jury
17 trial in both cases was made for strategic reasons after conferring with counsel. Petitioner
18 offers absolutely no reason why the court's order consolidating the cases would have any
19 impact on his decision to waive his right to a jury trial on the prior conviction allegations.
20 Furthermore, petitioner offers no support for the proposition that the court was required to
21 fully inform him of the nature of the jury trial rights he was relinquishing prior to accepting
22 his waiver. Under these circumstances, the state court's decision finding that petitioner's
23 waiver was knowing and intelligent was not contrary to or unreasonable application of
24 clearly established federal law. See 28 U.S.C. § 2254(d)(1); see also *Crosby*, 678 F.3d at
25 788-89.

26 **III. Sentence**

27 Petitioner's final contention is that the sentence imposed was in excess of the trial
28 court's jurisdiction because his waiver of a jury trial on the prior conviction allegations was

1 invalid. Although he previously attacked the knowing and intelligent nature of the waiver,
2 here petitioner claims that the waiver is invalid because the court never made it clear as to
3 which case the waiver applied. This argument also lacks merit as the record reflects that
4 petitioner was aware of the prior conviction allegations filed in both cases and agreed with
5 his attorney that, for tactical reasons, he would waive his right to a jury trial on those prior
6 allegations. The court made it clear that, in both cases, petitioner had a right to a jury trial
7 on the substantive offenses as well as the prior convictions, and that he was waiving his
8 jury trial rights on the prior convictions only. After petitioner expressed his understanding of
9 the court's statement, the court accepted his waiver of a jury trial on the prior conviction
10 allegations in both cases. The record is unambiguous that the waiver applied to *both*
11 cases. Accordingly, petitioner's sentence, which was enhanced by the prior convictions,
12 did not exceed the court's jurisdiction.

13 Petitioner also argues that the sentence exceeded the court's authority because he
14 was improperly tried for an offense (vehicle theft) without first having a preliminary hearing.
15 As discussed in Section I, *supra*, there is no federal constitutional right to a preliminary
16 hearing. See *Gerstein*, 420 U.S. at 123 (1975). Insofar as petitioner's claim is premised on
17 errors of state law, he is not entitled to federal habeas relief. See *Estelle v. McGuire*, 502
18 U.S. 62, 67-68 (1991)

19 **IV. Appealability**

20 The federal rules governing habeas cases brought by state prisoners require a
21 district court that denies a habeas petition to grant or deny a certificate of appealability in
22 the ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254
23 (effective December 1, 2009).

24 A petitioner may not appeal a final order in a federal habeas corpus proceeding
25 without first obtaining a certificate of appealability (formerly known as a certificate of
26 probable cause to appeal). See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge shall
27 grant a certificate of appealability "only if the applicant has made a substantial showing of
28 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate

1 which issues satisfy this standard. See *id.* § 2253(c)(3). "Where a district court has
2 rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is
3 straightforward: The petitioner must demonstrate that reasonable jurists would find the
4 district court's assessment of the constitutional claims debatable or wrong." *Slack v.*
5 *McDaniel*, 529 U.S. 473, 484 (2000).

6 For the reasons set out above, jurists of reason would not find the result debatable
7 or wrong. A certificate of appealability will be denied. Petitioner is advised that he may not
8 appeal the denial of a COA, but he may ask the court of appeals to issue a COA under
9 Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a), Rules Governing
10 § 2254 Cases.

11 **CONCLUSION**

12 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**.
13 A Certificate of Appealability also is **DENIED**. See Rule 11(a) of the Rules Governing
14 Section 2254 Cases.

15 The clerk shall close the file.

16 **IT IS SO ORDERED.**

17 Dated: February 5, 2013.

18 
PHYLLIS J. HAMILTON
19 United States District Judge

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